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TRAFFICSCHOOL.COM, INC. and

DRIVERS ED DIRECT, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRAFFICSCHOOL.COM, INC., a
California corporation; DRIVERS ED
DIRECT, LLC, a California limited
liability company,

Plaintiffs,

v.

EDRIVER, INC., ONLINE GURU,
INC., FIND MY SPECIALIST, INC.,
and SERIOUSNET, INC., California
corporations; RAVI K. LAHOTI, RAJ
LAHOTI, individuals,

Defendants.

CASE NO. CV 06-7561 PA (CWx)

The Honorable Percy Anderson

PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ATTORNEY'S
FEES AND COSTS; MEMORANDUM
OF POINTS AND AUTHORITIES

Date: December 5, 2011

Time: 1:30 p.m.

Courtroom No. 15

*[Filed concurrently with Declarations
of Mina I. Hamilton and Josephine
Brosas in support of Motion;
[Proposed] Order; and Joint Statements
on Attorney's Fees and Costs per Court
Order (Docket Entry #2356)]*

1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 5, 2011, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard by the above-entitled Court, located at 312 N.
4 Spring Street, Los Angeles, California 90012, Plaintiffs Trafficschool.com, Inc. and
5 Drivers Ed Direct, LLC ("Plaintiffs") will and hereby do move this Court for an award
6 of attorney's fees and related costs.

7 This Motion is based on this Court's Order of August 24, 2011 [Docket Entry
8 ("D.E.") # 302] and based on the Ninth Circuit's August 23, 2011 Mandate. Plaintiffs
9 are entitled to an award of their attorney's fees and costs under 15 U.S.C. § 1117(a).

10 Plaintiffs seek \$2,867,616 in attorney's fees, which is the "presumptively
11 reasonable" lodestar amount adjusted by a 2.0 multiplier, as set forth in Tables 3-4.
12 Plaintiffs also seek \$65,001.44 in non-taxable recoverable costs, as set forth in Table 3,
13 plus post-judgment interest upon entry as provided by law, as accrued, until paid in full.

14 This Motion is based upon this Notice and Motion, the attached Memorandum of
15 Points and Authorities, the Joint Statements on Attorney's Fees and Costs, the
16 Declarations of Mina I. Hamilton and Josephine A. Brosas and all exhibits thereto, all
17 pleadings and papers on file in this action, and upon such other matters as may be
18 presented to this Court at or before the time of the hearing.

19 This Motion is made following the exchange of documents and conference of
20 counsel pursuant to Local Rule 7-3 and this Court's Order (D.E. # 302) which took
21 place on September 6th and 12th, 2011, and continuing thereafter.

22

23 DATED: November 3, 2011 LEWIS BRISBOIS BISGAARD & SMITH LLP

24

25

Bv: /s/
David N. Makous
Daniel C. DeCarlo
Mina I. Hamilton

26

27

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF NINTH CIRCUIT MANDATE

This case is exceptional pursuant to 15 USC § 1117(a) because the Ninth Circuit *said* it was exceptional and remanded it to this Court for consideration of an award of Plaintiffs' attorney's fees. In June of 2008 this Court judged that brothers Raj and Ravi Lahoti and their companies Online Guru, Inc., eDriver, Inc. Find My Specialist, Inc., and Seriousnet, Inc. ("Defendants") engaged in willful deceptive acts. [D.E. #210 at 20.] The well-funded Defendants¹ had chosen to vigorously yet unreasonably oppose at every step Plaintiff's legal quest to operate in a marketplace free of unfair competition. Now they must account and pay for that opposition.

The Ninth Circuit articulated that the correct legal standard "in determining whether to award attorney's fees" in this case was the consideration of (1) the "[the] substantial benefits" conferred by the "judgment and an injunction that ameliorated a serious public harm", and (2) the "defendants' bad acts." *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 2011 (9th Cir. 2011)("Opinion"), citing to cases, including *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 511 (9th Cir. 2011) for the correct legal standard (i.e., focusing on David Lahoti's willful violation of the Lanham Act, his "pattern and practice" of such violations, and his "practice of abusive litigation practices" as bad faith factors justifying the award of fees).²

The Ninth Circuit's mandate disposes of Defendants' argument that \$ 0 should be awarded in fees to Plaintiffs because "Plaintiffs are not 'prevailing parties' in an 'exceptional case' and the 'injunction that Plaintiffs obtained caused as much harm if

¹ Defendants are operators of the DMV.Org website which generated in excess of \$16 million in revenue in 2007 alone and which sees, according to Defendants, "more than 60 million users per year and ranks among the top 1,000 Web sites in the United States." See, http://www.onlineguru.com/news/news_2011_07_09.html, last visited on November 3, 2011. See, Hamilton Decl., ¶34, Ex. P.

² Plaintiffs are uncertain of the relationship, if any, between the David Lahoti found liable as a willful violator in the case cited by the Ninth Circuit and Raj and Ravi Lahoti found to be willful false advertisers in this case.

1 not greater harm than the benefit conferred.”³

2 *Compare the Ninth Circuit’s Opinion at p. 9757 . . .*

3 [21] Because the district court erred in finding that defen-
4 dants’ conduct wasn’t exceptional and that plaintiffs had
5 unclean hands, its denial of attorney’s fees was an abuse of
6 discretion. We remand for the district court to consider the
7 award of attorney’s fees anew in light of the considerations
8 discussed above.

8 and at p. 9754:

9 defendants’ conduct. It would be inequitable to force plain-
10 tiffs to bear the entire cost of enjoining defendants’ willful
11 deception when the injunction confers substantial benefits on
12 the public. See Comm. for Idaho’s High Desert, Inc. v. Yost,
13 92 F.3d 814, 818-19, 825 (9th Cir. 1996) (plaintiff was enti-

13 . . . with Defendants’ positions to this Motion at Comments pg. 4:

14 Plaintiffs are not entitled to a discretionary award of attorney’s fees under
15 the Lanham Act. Plaintiffs are not “prevailing parties” in an “exceptional case.”
16 35 U.S.C. § 1117(a).

17 On balance, the injunction that Plaintiffs obtained caused as much if not
18 greater harm than the benefit conferred. Defendants’ free speech rights have been

19 True to form, Plaintiffs insist on pursuing untenable arguments, forcing Plaintiffs to
20 respond to even the threshold and indisputable position that this an exceptional case
21 entitling Plaintiffs to their attorneys fees as the prevailing party that conferred
22 significant benefits to the public in the relief obtained. Based on the Ninth Circuit’s
23 Opinion alone, an award of attorney’s fees has been mandated.

24 In further consideration of the amount of fees to be awarded is Defendants’
25 conduct during litigation. As explained *infra*, despite clear evidence of false
26

27 ³ See, Defendants’ Comments to Joint Statement on Plaintiffs’ Motion for
28 Attorneys’ Fees (“Comments”) at p. 4:16-22.

1 advertising, Defendants forced Plaintiffs to expend ever increasing legal fees to try to
 2 keep the “moving target” of Defendants’ websites, and marketing practices, free from
 3 false and deceptive acts. Defendants also withheld documents until they were forced to
 4 turn them over by Court order, and repeatedly deny there is consumer confusion.

5 The relief that Plaintiffs seek is just and will encourage others to pursue claims
 6 against false advertisers, while deterring Defendants from willful misconduct.

7 **II. DEFENDANTS’ FAILURE TO FOLLOW THIS COURT’S ORDER**

8 On August 24, 2011, this Court issued an Order in response to the Mandate
 9 issued by the Ninth Circuit with respect to the scope and terms of the permanent
 10 injunction and the award of attorney’s fees to Plaintiffs. (D.E. #302). This Order set
 11 forth very specific procedures for the parties to follow in connection with Plaintiffs’
 12 Motion for Attorney’s Fees and Costs. For instance, at least seven (7) days prior to a
 13 required meet and confer conference, Plaintiffs were required to provide to Defendants’
 14 counsel certain documents comprised of: (1) billing records⁴; (2) information regarding
 15 the hourly rates that will be claimed; (3) evidence to support the “related nontaxable
 16 expenses” to be sought by the motion; and a (4) joint statement formatted as a
 17 spreadsheet containing several columns specified by this Court. Following the
 18 conference of counsel, and no more than fourteen (14) days prior to the filing of the
 19 Motion, Plaintiffs were required to provide to Defendants the final version of its portion
 20 of the Joint Statement, with Defendants to return their portion at least seven (7) days
 21 prior to the filing of the Motion. (*Id.*) Significantly, Defendants were required to
 22 _____

23 ⁴ Plaintiffs only redacted invoices to the extent necessary to prevent disclosure
 24 of information protected by the attorney-client privilege or work product doctrine, as
 25 provided for by this Court’s Order (D.E. # 302, p. 1) (“These records may be
 26 redacted to prevent disclosure of material protected by the attorney-client privilege
 27 or work product doctrine.”) The invoices are not heavily redacted. (See Exh.F to
 28 Hamilton Decl., ¶14) They show that Plaintiffs redacted only portions that would
 have disclosed the substance of client communications and/or strategy—See e.g.
 11/17/06 entry: “Telephone conference with client re: [redacted]; and “discussion
 with D. Makous re: strategy [redacted]”.

1 provide a “brief summary” of *its position as to each* disputed “time entry” in this
 2 spreadsheet. (*Id.* at p. 2). They however, did not do so.

3 Rather than provide their position as to each time entry as required, Defendants
 4 incorporated by reference into *every single* entry an omnibus and identical catchall
 5 objection. See, Defendants' Comments and Serwin Decl. in support thereof”.⁵ (See ¶ 9
 6 to Hamilton Decl.) This is not helpful to the Court and defeats the purpose of the
 7 Court’s Order that *each* disputed entry must be separately addressed so that Plaintiffs
 8 can respond when they file their Motion and so that the Court can assess which fees are
 9 disputed. Instead, Defendants merely state that they dispute *all fees*.

10 In an attempt to distract from the fact that they have no real argument in dispute,
 11 Defendants devote *4 out of its 6-page* “comments” submission to its skewed “version”
 12 of the parties’ meet and confer efforts (which is inaccurate as Plaintiffs have fully
 13 complied with the Order, see Hamilton and Brosas Declarations).

14 **III. PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEY’S FEES**

15 A. Legal Standard

16 Section 35(a) of the Lanham Act provides that “[t]he court in exceptional cases
 17 may award reasonable attorney fees to the prevailing party.” 15 U.S.C. § 1117(a).
 18 Here, there can be no serious dispute that Plaintiffs are entitled to their fees because
 19 they are the “prevailing party” in this “exceptional” case, as confirmed by the Ninth
 20 Circuit’s Mandate.

21 B. Plaintiffs Are Entitled To Fees According To The Ninth Circuit

22 The Ninth Circuit unequivocally ruled that Plaintiffs are entitled to their
 23 attorney’s fees by reversing the denial of fees and remanded to this Court for
 24 _____

25 ⁵ There are approximately 3,000 entries in the Joint Statement spreadsheet
 26 painstakingly prepared by Plaintiffs and separated by Plaintiffs into tabbed
 27 categories (e.g. “pleadings”, “discovery”, “summary judgment”, “pre-trial” and
 28 “trial”). All that Defendants did was copy and paste an omnibus and useless
 statement into each of these entries, and nothing more. (See ¶13; 15 to Hamilton
 Decl.)

1 reconsideration. (Opinion at p. 9757).

2 The “considerations” that the Ninth Circuit looked at in reaching the above
 3 conclusion were two-fold: (1) “plaintiffs obtained a judgment and an injunction that
 4 ameliorate a serious public harm”; and (2) “the unlawfulness of defendants’ conduct.”
 5 (*Id.* at p. 9754). The Ninth Circuit recognizing that:

- 6 • “[U]sing litigation to shut down a competitor who uses unfair trade
 7 practices is precisely what the Lanham Act seeks to encourage.”
- 8 • “It would be inequitable to force plaintiffs to bear the entire cost of
 9 enjoining defendants’ willful deception when the injunction confers
 10 substantial benefits on the public.”
- 11 • Plaintiffs furthered the purpose of the Lanham Act “by obtaining a
 12 judgment and an injunction that ameliorate[d] a serious public harm” and
 13 by putting to “an end the confusion created by DMV.org”; and
- 14 • “Plaintiffs put an end to the confusion created by DMV.ORG and stopped
 15 consumers from mistakenly transferring sensitive personal information to
 16 a commercial website. This conferred significant benefits on third parties
 17 and also vindicated plaintiffs’ right to a ‘market free of false
 18 advertising.’” Opinion, at pp. 9754-9757. (Emphasis in original)

19 Further identified were the following plethora of Defendants’ bad acts:

- 20 • “[D]efendants planned to mislead site visitors and knew that their
 21 conduct confused consumers.”
- 22 • “Defendants associated their website with URLs and search terms that
 23 falsely implied DMV.org was a government site.”
- 24 • They had in their possession hundreds of emails sent by customers
 25 who contacted DMV.org thinking it was a state agency. And
 26 DMV.org’s director of customer service testified that he voiced
 27 concerns about these emails to senior management.”
- 28 • “[D]efendants knew that the disclaimers were ineffective, because
 adding them didn’t end the stream of emails sent by consumers who
 thought they’d contacted their state DMV.”

- 1 • “There was overwhelming proof that defendants knew their statements
2 confused customers and did little or nothing to remedy it.”
- 3 • “The district court could reasonably infer that [Defendants] willfully
4 deceived the public.” (Opinion at pp. 9754 - 9755).

5 Defendants seem intent on advancing a remarkable theory in opposing Plaintiffs’
6 motion for fees—one that is squarely irrelevant in view of the Ninth Circuit’s Mandate
7 and this Court’s Order. (August 24, 2011 Order, D.E. # 302) Defendants proclaim that
8 “Plaintiffs are not entitled to a discretionary award of attorney’s under the Lanham Act”
9 and that “Plaintiffs are not ‘prevailing parties’ in an exceptional case.” (See
10 “Comments”, p. 4, lns. 20-22). This flouts the Ninth Circuit’s Mandate and this
11 Court’s Order and is plainly untenable.

12 C. Plaintiffs Are The “Prevailing Party”

13 The Supreme Court and the Ninth Circuit have stated that a “prevailing party” is
14 “the party succeeding on a significant litigated issue that achieves some of the benefits
15 sought by that party in initiating the suit.” *Montgomery v. Noga*, 168 F.3d 1282, 1304
16 (11th Cir. 1999); *EchoStar Satellite Corp. v. NDS Group PLC*, 390 Fed. Appx. 764,
17 766-767 (9th Cir. 2010), citing to *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).
18 Nothing more is required. Plaintiffs are the prevailing party.⁶ Most significantly, the
19 Ninth Circuit’s ruling that this Court’s denial of attorney’s fees to Plaintiffs was an
20 abuse of discretion confirms that Plaintiffs are indeed the “prevailing party” based on
21 the simple fact that only a “prevailing party” is entitled to attorney’s fees under 15
22 U.S.C. § 1117(a). Not only did Plaintiffs prevail on almost all of the issues, but they
23 prevailed on the key substantive issues relevant to their claim for fees: liability for
24 _____

25 ⁶ Defendants’ strangely ignored the plethora of victories by Plaintiffs before
26 this Court and on appeal. The Ninth Circuit’s remand for this Court to consider for
27 the first time First Amendment issues related to the present injunction is not a
28 finding by the Ninth Circuit that “Defendants’ free speech rights have been
unnecessarily infringed upon,” as Defendants suggest in their Comments. See e.g.,
Table 1 hereto.

1 willful false advertising under the Lanham Act and imposition of a permanent
 2 injunction against Defendants. On appeal, the Ninth Circuit affirmed that that
 3 injunction was the “optimal means of correcting defendants’ false advertising.” *Opinion*
 4 at 9749 (emphasis added). Obtaining a permanent injunction (regardless of its form) in
 5 a Lanham Act case has been found to be a “significant benefit” that renders a plaintiff a
 6 “prevailing party” entitled to fees. *See Montgomery*, 168 F.3d at 1304 (award of
 7 permanent injunctive relief was a “significant benefit” sought in initiating the suit and
 8 supported a grant of attorney’s fees). *See also Audi AG v. D’Amato*, 469 F.3d 534, 550-
 9 51 (6th Cir. 2006) (holding that a plaintiff who successfully obtained injunctive relief
 10 for a violation of the Lanham Act was a “prevailing party” within the meaning of
 11 section 1117(a)). No doubt, Plaintiffs succeeded on the primary litigated issue by
 12 proving their false advertising case, not once, *but twice* – both before this Court and the
 13 Ninth Circuit. Plaintiffs are the prevailing party.

14 **IV. THE FEES REQUESTED ARE REASONABLE AND WARRANTED**

15 A. Summary Of The Lodestar Method, The Attorney’s Fees Requested, And 16 Supporting Evidence

17 In determining reasonable fees in Lanham Act cases, courts have employed the
 18 “lodestar” method. *See e.g., Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir.
 19 1993). “When it sets a fee, the [court] must first determine the presumptive lodestar
 20 figure by multiplying the number of hours reasonably expended on the litigation by the
 21 reasonable hourly rate.” *Id.* at 622.

22 “Although in most cases, the lodestar figure is presumptively a reasonable fee
 23 award, the district court may, if circumstances warrant, adjust the lodestar to account
 24 for other factors which are not subsumed within it.” *Ferland v. Conrad Credit Corp.*,
 25 244 F.3d 1145, 1149 n.4 (9th Cir. 2001). Specifically, the “presumptively reasonable”
 26 lodestar figure may be adjusted based upon the factors listed in *Kerr v. Screen Extras*
 27 *Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (*Kerr*), *cert. denied*, 425 U.S. 951
 28 (1976). These factors are as follows:

(1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the necessary skill required; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstance; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys on the case; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr*, 526 F.2d at 70 (Emphasis added.)⁷

The court need only consider those factors that are relevant to the case. *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069, 1073 (9th Cir. 1983).

Moreover, “time spent in establishing the entitlement to and amount of the fee is compensable.” *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659-60 (9th Cir. 1985); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008); *United States v. \$ 60,201.00 United States Currency*, 291 F. Supp. 2d 1126, 1131 (C.D. Cal. 2003) (where the district court found that the claimant was entitled to compensation for the time spent in connection with the motion for fees).

Plaintiffs seek a “presumptively reasonable” lodestar figure of \$1,433,808, adjusted upward by a 2.0 multiplier, totaling \$2,867,616 (based on certain *Kerr* factors not already taken into account when determining the lodestar). The \$1,433,808 lodestar figure is calculated by multiplying the number of hours reasonably expended on proceedings before the district court prior to the appellate proceedings (i.e., 2,679.7 hours), including this Motion (about 210 hours, incorporating time estimated for the Reply and any hearing) and the preparation of the Joint Status Report which the parties filed on September 6, 2011 (D.E. #306) (about 115 hours) by the reasonable hourly rates (i.e., \$503 for partners and \$349 for associates, which is based upon the prevailing market rates; see Hamilton Decl., ¶¶ 16-17, Table 2). The upward adjustment of the

⁷ The bolded *Kerr* factors are relevant to this case and are either subsumed within the reasonableness of the lodestar figure requested or are factors in favor of an upward adjustment to the lodestar figure, as discussed *infra*,

1 lodestar by a relatively modest 2.0 multiplier⁸ is warranted based on application of
 2 certain *Kerr* factors as discussed *infra*.

3 B. The Hourly Rates Requested In This Motion Are The “Prevailing
 4 Market Rates”

5 A reasonable hourly rate is the “prevailing market rate of the relevant
 6 community,” not necessarily the hourly rate charged to the client. See, *Carson v.*
 7 *Billings Police Dep’t*, 470 F.3d 889, 892 (9th Cir. 2006)(“[T]here is such a thing as a
 8 high charger and low charger, and the district judge is supposed to use the prevailing
 9 market rate for attorneys of comparable experience, skill and reputation, *which may or*
 10 *may not be the rate charged by the individual attorney in question.*”)(emphasis added);
 11 see also, *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Jordan v. Multnomah County*, 815
 12 F.2d 1258 (9th Cir. 1987)(the prevailing market rate in the community is indicative of
 13 the reasonable hourly rate); *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir. 2001)(a
 14 reasonable hourly rate is calculated according to the prevailing market rates in the
 15 community in which the court sits). In this case, the relevant community is Los
 16 Angeles.

17 Reports based on surveys periodically conducted and prepared by the American
 18 Intellectual Property Law Association (“AIPLA Survey”), and published every other
 19 year to determine the billing rates in intellectual property cases are frequently referred
 20 to and used by courts to determine prevailing market rates in fee applications. See e.g.,
 21 *View Engineering v. Robotic Vision*, 208 F.3d 981, 987 (Fed. Cir. 2000)(court looked to
 22 the AIPLA Survey to determine the reasonable lodestar rate); *see also Ulead Sys., Inc.*
 23 *v. Lex Computer & Mgmt. Corp.*, 151 F. Supp. 2d 1192, 1211-1212 (C.D. Cal. 2001).

24 Here, based on relevant AIPLA Surveys (Hamilton Decl., ¶16, Ex. G) the
 25

26 ⁸ As discussed *infra*, a 2.0 multiplier, which is higher than that claimed by
 27 Plaintiffs on appeal, is appropriate here because of Defendants’ scorched-earth
 28 litigation tactics and refusal to capitulate *throughout this case* at every step of the
 way, from inception to post-trial and post-appeal.

1 prevailing hourly market rate in the Los Angeles area is \$503 for partners and \$349 for
 2 associates— those are the rates that should be applied, not the rates actually charged
 3 which are below those rates. Moreover, the attorneys who have worked on this case
 4 have substantial experience in the field of false advertising and Lanham Act cases. *See*
 5 Hamilton Decl., ¶¶21-25, Ex. I. Despite this level of experience, expertise and ability,
 6 the rates actually charged to Plaintiffs was over 30% lower on average with respect to
 7 the prevailing market rate for partners, and at least 40% lower on average with respect
 8 to the prevailing market rate for associates. See Table 3, *infra*. Also, as can also be seen
 9 in The National Law Journal's 2010 Billing Survey Report, the rates actually charged
 10 were also well below most of the those charged by the nation's 250 largest law firms.⁹

11 "[R]ate determinations in other cases . . . are satisfactory evidence of the
 12 prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d
 13 403, 407 (9th Cir. 1990). Courts have routinely concluded that rates in excess of \$500
 14 per hour are reasonable for experienced counsel handling complex litigation. *See, e.g.*,
 15 *Moore v. Bank of America, N.A. (USA)*, 2008 WL 68851, at *3 (S.D. Cal. Jan. 7,
 16 2008)(concluding that \$ 550 per hour is a reasonable hourly rate); *Eldorado Stone*,
 17 2007 WL 3308099, at *4 (finding hourly rates up to \$ 520 per hour reasonable); *See*,
 18 *e.g.*, *Mitchell v. Metropolitan Life Ins. Co.*, 2008 WL 1749473, at *2 (CD. Cal. April 7,
 19 2008), at *2 (finding that "the 2008 prevailing market rate for plaintiff-side partner-
 20 level ERISA attorneys is \$ 400-575/hour"); *Hawkins-Dean v. Metropolitan Life Ins.*
 21 *Co.*, 2007 WL 2735684, at *3 (CD. Cal. Sep. 18, 2007)(awarding attorney's fees for a
 22 partner with 20 years experience at the rate of \$ 575 per hour); *Caplan v. CNA*
 23 *Financial Corp.*, 2008 WL 3970864, at *3-4 (N.D. Cal. Aug. 20, 2008)(awarding

24
 25 ⁹ At Foley & Lardner (defense counsel's firm), it is reported that—***firm wide*** and
 26 not just intellectual property attorneys who generally bill at ***higher*** rates—***partners*** bill
 27 at an average rate of ***\$654*** an hour, and ***associates*** at ***\$426*** an hour. It is also reported
 28 that at Sheppard Mullin Richter and Hampton (former defense counsel who handled the
 district court proceedings), partners bill at a high-end firm wide rate of ***\$820*** and
 associates at a firm wide high-end rate of ***\$620*** (average rates were not reported). *See*,
 Hamilton Decl., ¶ 17, Ex. H.

1 attorney's fees for a partner with 20 years experience at the rate of \$ 575 per hour);
 2 *Pande v. ChevronTexaco Corp.*, 2008 WL 906507, at *4 (N.P. Cal. Apr. 1, 2008)
 3 (awarding partner with 20 years experience in complex business litigation an hourly
 4 rate of \$ 575); *Petroleum Sales, Inc. v. Valero Refining Co.-California*, 2007 WL
 5 2694207, at *5-6 (N.D. Cal. Sep. 11, 2007) (awarding attorney's fees for a partner with
 6 20 years experience at the rate of between \$ 515 and \$ 575 per hour; awarding
 7 attorney's fees for a partner with 30 years experience at the rate of \$ 616 per hour).

8 Accordingly, the rates actually charged should not be applied to determine the
 9 lodestar figure; rather, the reasonable prevailing market rates of \$503 for partners, and
 10 \$349 for associates should be used.

11 C. The Hours Claimed Were Reasonable and Necessary

12 The hours billed on this complex matter were reasonable in that they span four
 13 years of litigation, including a bench trial, and reflect time exacerbated by the
 14 unreasonable positions and tactics of Defendants' litigation conduct. These total hours
 15 expended are in line with similar cases. See, e.g., *Eldorado Stone LLC v. Renaissance*
 16 *Stone*, 2007 WL 3308099, at *2 (S.D. Cal. Oct. 24, 2007) (awarding plaintiff fees
 17 totaling \$ 1,925,230 following jury verdict finding defendant intentionally infringed
 18 plaintiff's trademark, copyright and misappropriated plaintiff's trade secret).

19 In *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, 2009 U.S. Dist. LEXIS
 20 4005, 11-14 (S.D. Cal. Jan. 20, 2009), the Court granted the Plaintiff's motion for
 21 attorneys' fees, awarding \$ 1,235,404 (the full amount requested by Plaintiff) for 3,366
 22 hours of work performed in a Lanham Act case spanning just over two years, "in light
 23 of the experience and skill of counsel, the quality of representation provided by
 24 counsel, and the excellent results obtained for the client." *Id.* at *12-13.

25 Indeed, the approximately 2,679.7 hours of attorney time spent in proceedings
 26 before the district court were incurred, necessary and reasonable in order to complete
 27 the multiple and varied tasks related to the following general categories: (1) *pleadings*
 28 and amendments thereto, including successfully opposing Defendants' motions to

1 dismiss (about 241.20 hours); (2) *fact and expert discovery*, including written
 2 discovery, depositions, preparation of expert initial and rebuttal reports, surveys, and
 3 motions to compel (about 773.30 hours); (3) *cross-motions for summary judgment*; (4)
 4 *pre-trial submissions*, including witness lists, exhibit lists, jury instructions,
 5 memorandum of contentions of fact and law, motions in limine, and additional specific
 6 filings dictated by this Court's order (trial declarations, deposition designation,
 7 stipulation regarding trial exhibits (about 463.10 hours); (5) *bench trial and Court-*
 8 *ordered post-trial filings*, such as post-trial briefs and findings of fact and conclusions
 9 of law, and Defendants' motion to stay the injunction (about 590.90 hours); (6) and
 10 Plaintiffs' contempt motion (about 143.70 hours). See Hamilton Decl., ¶18. In
 11 addition, at least 115 hours have been incurred in connection with the Joint Status
 12 Report (D.E. # 306) (not including additional fees to be incurred later, on remand) and
 13 there are at least 210 hours that Plaintiffs anticipate have been and will be incurred in
 14 connection with this instant Application, which is allowed as part of the claimed fees.
 15 *See In re Nucorp Energy and Camacho, supra.*

16 Defendants fought Plaintiffs every step of the way— from the pleadings,
 17 discovery, summary judgment, throughout the bench trial and post-trial, and to this
 18 Court's judgment and imposition of a permanent injunction. Defendants were well-
 19 funded and highly-motivated litigants with sophisticated (and multiple) counsel from
 20 the established Sheppard Mullin Richter and Hampton firm. At stake was the propriety
 21 of Defendants' marketing practices for DMV.org, which was “already a successful
 22 website” when Plaintiffs filed its suit in 2006, resulting in revenues of \$11.6 million in
 23 2006 and in excess of \$16 million in 2007. Hamilton Decl., ¶ 34, Ex. P.

24 *I. Initial And Amended Pleadings*

25 Defendants sought to slow down the judicial process at every opportunity and
 26 have forced Plaintiffs to expend significant resources even from the very beginning —
 27 by bringing a motion to dismiss the original complaint alleging that Plaintiffs were
 28 asserting a trademark infringement claim, even though it was *clear* that Plaintiffs claim

1 sounded in false advertising— then, by bringing a *second* motion to dismiss the FAC
 2 even though there were numerous allegations in the FAC that the parties were indeed
 3 competitors.¹⁰ Then, Defendants opposed each of Plaintiffs' requests for leave to
 4 amend, and each time, leave was granted by the Court.¹¹

5 2. Discovery

6 Discovery in this case was extensive. Defendants continuously rebuffed
 7

8 ¹⁰ Specifically, On November 28, 2006 Plaintiffs filed their initial complaint for
 9 false advertising under § 43(a) of the Lanham Act and unfair competition under §
 10 17200 *et seq.* of the California Business and Professions Code. (D.E. No. 1).
 11 Defendants filed a motion to dismiss on December 28, 2006, arguing that Plaintiffs
 12 did not have an commercial interest in the DMV trademark and therefore did not
 13 have standing for a false association Lanham Act claim under 15 U.S.C.
 14 §1125(a)(1)(A). (D.E. # 9). On January 22, 2007, this Court concluded that the
 15 complaint did not allege competition that was necessary for standing under a false
 16 advertising claim under 15 U.S.C. §1125(a)(1)(B) and on this basis dismissed the
 17 complaint, with leave to amend. (D.E. # 12). On February 5, 2007, Plaintiffs filed a
 18 First Amended Complaint, addressing the issues raised in the Court's January 22,
 19 2007 Order. (D.E. # 15). Nevertheless, on February 22, 2007, Defendants filed
 20 *another* motion to dismiss, challenging the amended complaint again based on
 21 standing. (D.E. # 18). On March 15, 2007, this Court denied Defendants' second
 22 motion to dismiss the complaint based on standing. (D.E. # 24). According to this
 23 Court: "Defendants challenge the FAC on the ground that Plaintiffs lack standing. . .
 24 . As previously explained by this Court, Plaintiffs 'must allege commercial injury
 25 based upon a misrepresentation about a product, and also that the injury was
 26 'competitive,' i.e., harmful to the plaintiff's ability to compete with the defendant.'
 27 [citations omitted] . . . The FAC plainly satisfies these requirements." (*Id.* at p. 1)
 28 (emphasis added).

11 On May 14, 2007, Plaintiffs moved for leave to file a Second Amended
 12 Complaint to add certain defendants. (D.E. # 28). Even though amendments are
 13 often stipulated to between parties in light of the rules favoring amendments,
 14 Defendants refused to stipulate and vigorously opposed Plaintiffs' motion. (D.E.
 15 #31). On June 11, 2007, this Court granted Plaintiffs' motion. (D.E. # 32). On July
 16 10, 2007, Plaintiffs moved to file a Third Amended Complaint based on newly
 17 discovered evidence (left undisclosed and unclarified by Defendants) that Raj and
 18 Ravi Lahoti are in fact, two distinct individuals, and based on deposition testimony
 19 that Raj and Ravi Lahoti are each 50% co-owners of Defendants Online Guru, Inc.,
 20 EDriver, Inc. and Find My Specialist. (D.E. # 41). Despite the clear justifications
 21 for amendment, Defendants again, for the third time, opposed Plaintiffs'
 22 Application. (D.E. #42). On July 17, 2007, this Court granted Plaintiffs'
 23 Application. (D.E. # 43). On July 17, 2007, Plaintiffs' Third Amended Complaint
 24 (the operative complaint) was filed and entered by this Court in its docket. (D.E. #
 25 44). Defendants filed an answer to the Third Amended Complaint on August 10,
 26 2007, in which they asserted twelve affirmative defenses, including unclean hands,
 27 laches, and that Plaintiffs lack standing. (D.E. # 113).

1 Plaintiffs efforts to obtain documents and information fundamental to Plaintiffs' false
 2 advertising case, culminating in Plaintiffs having to seek this Court's intervention. On
 3 August 3, 2007, Plaintiffs filed their motion to compel the production of documents,
 4 which sought, *inter alia*, emails to DMV.org which evidence consumer confusion.
 5 (D.E. # 46). On August 14, 2007, the Court granted Plaintiffs' motion in part and
 6 ordered further production of documents including unredacted versions of all third
 7 party emails already produced by Defendants and additional third party emails showing
 8 confusion.¹² (D.E. # 57).

9 Plaintiffs took and/or defended several depositions in this case (over eighteen
 10 party, third party and expert depositions) and obtained evidence relied upon by this
 11 Court and the Ninth Circuit is their holdings. In addition to significant volumes of
 12 anecdotal evidence¹³, Plaintiffs also commissioned consumer surveys which compiled
 13 persuasive evidence of consumer deception of California consumers. Defendants
 14 submitted their rebuttal report and testimony, and also commissioned their own
 15 "rebuttal survey." (See D.E. # 210, pp. 10-19)¹⁴. Nonetheless, even on appeal,
 16 Defendants characterized all this evidence of confusion "scant." Appeal Docket #26 at
 17 12; #33 at 1 and 11.

18 3. *Cross-Motions for Summary Judgment*

19 On August 10, 2007, Defendants filed their Motion for Summary Judgment on
 20 _____

21 ¹² Several of these emails were cited by the Ninth Circuit as evidence of actual
 22 consumer confusion. (Opinion, p. 9746).

23 ¹³ As this Court noted in its Findings of Fact and Conclusions of Law:
 24 "Defendants have received myriad emails showing that many members of the public
 25 [general public, law enforcement personnel, and even employees of actual official
 state motor vehicle departments] are confused into thinking that DMV.ORG is an
 evidence." (D.E. # 210, p. 13).

26 ¹⁴ This Court noted that "Plaintiffs' survey is the more credible of the two. The
 27 anecdotal and survey evidence sufficiently establishes that Defendants' website has
 the tendency to deceive a substantial segment of its audience." (D.E. # 210, p. 19).

1 Plaintiffs' claims, again, arguing that Plaintiffs have failed to demonstrate Article III
 2 standing, standing under § 17200 et seq., or standing under the Lanham Act.¹⁵
 3 Defendants also sought summary judgment on their affirmative defenses of unclean
 4 hands and laches. (D.E. # 50). On August 20, 2007, Plaintiffs filed their Motion for
 5 Summary Judgment on both of their claims. (D.E. # 59).

6 In their Opposition, Defendants defiantly and incessantly refused to acknowledge
 7 that there was overwhelming public evidence of public deception and false advertising,
 8 calling it "only a small number of instances [that] can be dismissed as inconsequential"]
 9 (D.E. #65, p. 17). Plaintiffs were forced to rebut this (and other erroneous factual and
 10 legal contentions) and direct the Court to volumes of evidence showing otherwise.

11 4. *Bench Trial And Disposition*

12 This Court held a bench trial from November 6-8, 2007. (D.E. #s 169, 191 and
 13 192). A significant volume of evidence by way of trial declarations, deposition
 14 designations, examination of witnesses, exhibits, and oral testimony was taken on all
 15 issues, including liability and remedy. (D.E. #s 139-168).

16 Several specific and extensive filings were asked for by this Court to complete
 17 the trial record to be filed up to and until January 24, 2008, as follows: (1) a stipulation
 18 for the admission of trial exhibits on November 14, 2007 (D.E. # 184); (2) deposition
 19 testimony of three expert witnesses on November 13, 2008 (D.E. # 178, 179, 181); (3)
 20 post-trial briefs on November 28, 2007 (D.E. #s 198, 202); and (4) final post-trial
 21 findings of fact and conclusions of law by January 24, 2008 (D.E. #s 208, 209).

22 5. *Post-Trial Proceedings and Plaintiffs' Motion for Contempt*

23 On June 4, 2008, this Court issued its Findings of Fact and Conclusions of Law.
 24

25 ¹⁵ Defendants vigorously argued in summary judgment that Plaintiffs lacked
 26 standing, but as this Court recognized in its Order "Defendants's arguments were
 27 previously rejected by the Court when Defendants made them in a motion to
 28 dismiss.[citations omitted]. Defendants now attempt to make the same arguments in
 a new way..." (Order re MSJs, D.E. # 106, p. 4)

(D.E. #210). A Proposed Judgment and Permanent Injunction was attached to the Order with an invitation for both sides to object to its form. (*Id.*) On June 18, 2008, both parties filed their objections. (D.E. #s 212, 213). On August 26, 2008, after considering the parties' objections, this Court entered the Judgment and Permanent Injunction against Defendants. (D.E. # 215). On September 16, 2008, Defendants moved before the District Court for a stay of the Injunction pending appeal (D.E. # 235). Plaintiffs were forced to oppose this motion and it was denied on October 20, 2008 (D.E. #260).

On January 5, 2009, Plaintiffs filed their Motion for Contempt against Defendants for Violation of the Court's Injunction and for Sanctions. (D.E. # 261). While the Court denied the motion, the Court recognized that the injunction should be modified to clarify certain requirements, as follows: "Ordinarily, the Court might modify paragraph (f) of the injunction to require that the lettering in paragraph (c) appear larger than any lettering used in the DMV.ORG logo, without specifying the size of the language in paragraph (c). However, the injunction is currently on appeal, and therefore the Court declines to modify the injunction in the absence of a stipulation from the parties." (D.E. # 290).

D. Plaintiffs Are Entitled To All Time Claimed

Plaintiffs provided more than adequate documentation in support of the amount of fees requested. Plaintiffs submitted all that was required by this Court's Order—all billing invoices, documents showing the prevailing market rates that will be claimed, and a Joint Statement itemizing the category of tasks and the hours that Plaintiffs are claiming. See Hamilton Decl., ¶¶ 4-6; 12-17, Exs. E-H.

In their "Comments to the Joint Statement" Defendants argue that Plaintiffs "have not allocated their attorneys' time between Lanham Act claims and non-Lanham Act claims, as well as on issues that they clearly lost." (Comments, p. 5). The Court's precedent disposes of this argument. First, apportionment of the Lanham Act claims and the non-Lanham Act unfair competition claims is not an issue here because the

1 false advertising and unfair competition claims are inextricably intertwined¹⁶ as both
 2 arise out of the same allegations regarding Defendants' willful deceptive practices
 3 using their DMV.ORG website. At issue under 15 U.S.C. § 1125 was whether the
 4 DMV.ORG website likely misled consumers to believe that DMV.ORG was a
 5 government website, thus creating an unfair competitive advantage to Defendants that
 6 was harmful to Plaintiffs. (D.E. #44). This is the same issue as Business and
 7 Professions Code, section 17200.

8 Indeed, in *Pom Wonderful, LLC v. Purely Juice, Inc.*, 2008 U.S. Dist. LEXIS
 9 110460 (C.D. Cal. Sept. 22, 2008), Plaintiff tried to recover legal fees incurred in
 10 litigation for violation of § 17200 et seq. claims and its Lanham Act claims. This Court
 11 concluded that plaintiff's claims are "so inextricably intertwined" that an attempted
 12 adjustment would be "meaningless." . . . The same evidence was presented on all three
 13 of plaintiff's claims and the gravamen of those claims was defendants' deceptive
 14 advertising." *Id.* at 7-8 (Emphasis added.). Similarly, in *Cyclone USA, Inc. v. LL&C*
 15 *Dealer Servs., LLC*, 2010 U.S. Dist. LEXIS 51193, 19-20 (C.D. Cal. May 24,
 16 2010), where the Court awarded over \$2 million in fees, this Court found that because
 17 of "inherent interrelationship and factual overlap" between the Lanham Act and non-
 18 Lanham Act claims (e.g., breach of contract, fraud and state unfair competition claims),
 19 no meaningful apportionment would be possible. *Id.* at 18-20. The same applies here.

20 Second, it is immaterial that Plaintiff did not prevail on the motion for contempt
 21 and the denial of an award of Defendants' profits. *See Gates v. Deukmejian*, 987 F.2d
 22 1392 (9th Cir. 1992)("[A] litigant need not prevail on every claim in order to receive a
 23 full fee."); *See also Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)("Where a lawsuit
 24 consists of related claims, a plaintiff who has won substantial relief should not have his
 25 attorney's fees reduced simply because the district court did not adopt each contention

26
 27 ¹⁶ *Gracie v. Gracie*, 217 F.3d 1060, 1070 (9th Cir. 2000) ("apportionment or an
 28 attempt at apportionment is required unless the court finds the claims are so
 inextricably intertwined that even an estimated adjustment would be meaningless").

1 raised.") Nevertheless, as discussed *infra*, Defendants' compliance with the injunction
 2 is still at issue given Defendants' constantly-changing website and deceptive marketing
 3 practices.

4 E. Defendants' Contempt Is Still Very Much An Issue As Evidenced By Its
 5 Continued Failure To Comply With The Injunction

6 Defendants have continued to defiantly repudiate this Court's permanent
 7 injunction. Since the Injunction issued, Defendants have failed to comply with it, and
 8 their litigation conduct in this regard should not be ignored.

9 Defendants' current splash page is not a splash page, but rather a "welcoming
 10 screen" that effectively disguises the disclaimer in small font at the very top of the
 11 screen, so that many users will not see it. Indeed, legal commentators discussing this
 12 case have noted this issue. See, Joint Status Report, previously filed. Defendants have
 13 decided to replace the DMV.org logo upon which the injunction was issued with a
 14 happy-faced, flag-bearing mascot designed to appeal to and entice new and/or younger
 15 drivers. Exh. N, ¶ 30 to Hamilton Decl. It appears that Defendants have taken a page
 16 from the cigarette manufacturers' play book—one that is analogous to their "Joe
 17 Camel" mascot for Camel cigarettes from late 1987 to 1997.¹⁷

18 Moreover, Defendants' website, including the splash page, have consistently
 19 been moving targets – forcing Plaintiffs to constantly monitor Defendants' compliance
 20 with the injunction (and thus, more fees were and will be incurred in the process).
 21 Since the injunction issued, Defendants have repeatedly changed the DMV.org logo on
 22 _____

23 ¹⁷ The importance of the youth market to cigarette manufacturers (much like to
 24 Defendants here) was illustrated in their presentation explaining that the "young
 25 adult market . . . represent[s] tomorrow's cigarette business. As this 14-24 age group
 26 matures, they will account for a key share of the total cigarette volume - for at least
 27 the next 25 years." Tucker, CA. Presentation to the Board of Directors of RJR
 Industries (9/30/74). R. J. Reynolds. <http://legacy.library.ucsf.edu/tid/pqd49d00>.
 (Similarly appealing to Defendants, are the approximately 20,000 provisional
 licenses issued each month to *new* drivers including those under the age of 18).
 Hamilton Decl., ¶¶ 32-33, see also Ex. P.

1 the splash screen and the look of the splash screen, including: (i) *delaying* the
 2 disclaimer text, (ii) presenting the delayed disclaimer text in *faint grey font* that blends
 3 with the toolbar browser, (iii) using font that is *smaller* than the logo, and (iv) making
 4 changes to the logo, going from “unofficial guide” to “dmv made simple” and now
 5 back again to “unofficial.” See Exhs. 26-31, Exh. J-O to Hamilton Decl.

6 Defendants have also embarked on multiple other schemes designed to confuse
 7 more consumers through its purported “disclaimers”. Specifically, screen shots from
 8 the DMV.org website, in Table 5, Hamilton Decl., Ex. O, ¶31, detail the following
 9 deceptive practice that Plaintiffs are forced to raise: In using a disclaimer before
 10 consumers email the site, Defendants purport to direct the consumer to their local DMV
 11 and “**Online Services**” for that local DMV.¹⁸ However, the consumer is actually being
 12 directed to DMV.org’s own private services. This practice has resulted in consumer
 13 deception, which has caused a number of consumers (and likely hundreds, if not,
 14 thousands of others as evidenced by the confused consumers on Facebook) to pay fees
 15 to DMV.org (and its affiliates) under the mistaken belief that these were **required fees**
 16 by their local DMV office. [*Id.*, Ex. O].¹⁹

17 F. Kerr Factors Warrant An Upward Adjustment Of The “Presumptively
 18 Reasonable” Lodestar Amount

19 As discussed above, this Court can adjust the lodestar to account for other *Kerr*

20
 21 ¹⁸ After Plaintiffs’ complained of this, yet again, Defendants removed this
 22 particular “feature” from their site, which supports the notion that their constantly-
 23 evolving site is a moving target which Defendants toy with at their every whim in an
 24 effort to perpetrate further consumer confusion that they can benefit from, and only
 25 remove after Plaintiffs “call them” on the deceptive practice. As these new
 26 deceptive practices occurred post-trial in this case, Plaintiffs reserve all of their
 27 rights to bring a newly filed action on all claims and seek all damages and remedies
 28 caused by Defendants acts that were not adjudicated in this case at trial.

¹⁹ It is worth noting that Defendants have proceeded undeterred with all of these
 deceptive practices despite Plaintiffs taking issue with (and alerting this Court and
 Defendants themselves) about such practices in the September 6, 2011 Joint Status
 Report (D.E. # 306). Defendants truly are willful false advertisers (as the Ninth
 Circuit has found) who will stop at nothing, even after trial.

1 factors which are not subsumed within it.²⁰ At minimum—“time and labor required”,
 2 “novelty and difficulty of the questions presented”, “the customary fee” and the “results
 3 obtained”—are factors that militate in favor of an upward adjustment of the lodestar
 4 amount.

5 *I. The Time And Labor Required*

6 As noted in Section IV.C., *supra*, Defendants fought Plaintiffs every step of the
 7 way. Throughout the litigation, Defendants refused to acknowledge there was
 8 overwhelming evidence of public deception and false advertising. Plaintiffs were
 9 forced to rebut this and other erroneous factual and legal contentions and direct this
 10 Court to volumes of relevant evidence. Indeed, when the Ninth Circuit affirmed this
 11 Court’s liability finding, it noted that “the district court made extensive findings in
 12 support of its conclusion that the DMV.org URL, defendants’ search engine marketing
 13 strategy and the design of DMV.org were likely to, and did, confuse consumers.”
 14 Opinion at 9748 (emphasis added). Of course, these *extensive* findings were based on
 15 the extensive evidence produced by Plaintiffs before this Court which Plaintiffs
 16 presented on appeal. As the Ninth Circuit found, Plaintiffs “introduced volumes of
 17 evidence” showing that DMV.org “misleads consumers” and that “[t]here was
 18 overwhelming proof that defendants knew their statements confused consumers and did
 19 little or nothing to remedy it.” *Id.* at 9747 and 9755.

20 Defendants also steadfastly argued throughout the case—incessantly, from
 21 _____

22 ²⁰ See, *Morales v. City of San Rafael*, 96 F.3d 359, 363-364, ftn.9 (9th Cir.
 23 1996). The *Kerr* factors of “novelty and difficulty of the questions presented” and
 24 the “results obtained” are *not* subsumed in the analysis of the presumptively
 25 reasonable lodestar calculation discussed above. However, as noted above, the hours
 26 expended were necessary to respond to Defendants’ scorched-earth litigation tactics
 27 and refusal to capitulate at every turn. This refusal to capitulate is unrelated to
 28 complexity of the issues. Moreover, the results obtained included a strong public
 benefit component, which is separate from the benefit conferred on Plaintiffs as
 direct competitors of Defendants. Thus, the non-subsumed *Kerr* factors permit
 Plaintiffs to recover an enhancement for the novelty, success and unprecedented
 injunction which conferred a substantial public need.

1 initial pleadings through this appeal-- that Plaintiffs lacked standing and that they were
 2 not competitors. These arguments were all rejected by both this Court on summary
 3 judgment (*see* D.E. #106, p. 4) and, ultimately, by the Ninth Circuit when it affirmed
 4 standing and found that “Plaintiffs introduced volumes of evidence showing that they
 5 compete with Defendants.” (Opinion at p. 9747).

6 The above are just some examples of how Defendants vociferously challenged
 7 and argued against every issue in this case, forcing Plaintiffs to seek and present
 8 volumes of evidence to respond to Defendants’ aggressive (albeit unmeritorious)
 9 positions. These factors mandate an upward adjustment of the lodestar figure.

10 2. *The Novelty And Difficulty Of The Questions*

11 This was a case of first impression involving the DMV.org website, a for-profit
 12 website which many erroneously believed was run by their state’s Department Of
 13 Motor Vehicles. No other reported false advertising case like it existed. It culminated
 14 in an opinion which the Ninth Circuit certified for publication²¹. This Court considered
 15 several novel and difficult issues, ranging from Lanham Act standing (which resulted
 16 to the Ninth Circuit clarifying the standard enunciated in *Jack Russell*), willful false
 17 advertising injunctive relief (in the Internet context where the Court considered an
 18 unprecedented injunction which required the display of a “splash screen”), the unclean
 19 hands doctrine (based on highly unusual facts), the denial of attorney fees, and joint
 20 liability (in the context of an Internet false advertising case).

21 These were not simple legal issues, as readily acknowledged by the Ninth
 22 Circuit. For example, the standard cited in *Jack Russell*, the Court stated that
 23 “Defendants’ *confusion is understandable*, however because *Jack Russell* never
 24 explained how a plaintiff should go about proving commercial injury, *id.*, nor did
 25 _____

26 ²¹ Certification for publication is only provided for very limited cases, such as
 27 when the disposition “establishes, alters, modifies or clarifies a rule of law” or
 28 “involves a legal or factual issue of unique interest or substantial public
 importance”. *See* Ninth Circuit Rule 36-2.

1 *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995), the case *Jack Russell* cited in
 2 support of the commercial injury test.” *Opinion* at 9743; (Emphasis added.) On the
 3 issue of Plaintiffs’ entitlement to fees and unclean hands, the Ninth Circuit stated: “*It’s*
 4 *not clear* that the award of attorney’s fees is subject to equitable doctrines such as
 5 unclean hands...Nevertheless, we need not reach this issue because we reverse the
 6 unclean hands finding.” *Opinion* at 9756; (Emphasis added.) All of these issues and
 7 others merited significant attention by the attorneys on both sides and by this Court.
 8 Accordingly, this factor militates an upward adjustment of the lodestar figure.

9 3. *The Customary Fee*

10 As discussed in Section IV.A, *supra*, the rates charged by Plaintiffs’ counsel in
 11 this case are were below the market rate which include those charged by Defendants’
 12 counsel in this case.

13 Moreover, cases are legion where Courts have awarded significant fees in
 14 Lanham Act cases such as this. For example, in *Cyclone USA, Inc. v. LL&C Dealer*
 15 *Servs., LLC*, 2010 U.S. Dist. LEXIS 51193, 19-20 (C.D. Cal. May 24, 2010), a Lanham
 16 Act case with state unfair competition claims, the district court awarded over \$2 million
 17 in fees. In another Lanham Act case, *Skydive Arizona v. Quattrocchi*, 2011 U.S. Dist.
 18 LEXIS 34806 (March 21, 2011), the district court increased the reasonable hourly rate
 19 by \$100 per hour and awarded over \$1 million in fees. In *Love v. The Mail on Sunday*,
 20 2007 U.S. Dist. LEXIS 97061 (C.D. Cal. Sept. 7, 2007), the district court disposed of
 21 Plaintiffs’ Lanham Act claims on summary judgment and awarded over \$500,000 in
 22 fees, with interest. Finally, in *Oreck v. Dyson*, 2009 U.S. Dist. LEXIS 35530 (April 7,
 23 2009), the district court awarded the defendants over \$246,000 for a single summary
 24 judgment motion which disposed of the plaintiff’s false advertising claims.
 25 Accordingly, this factor also favors an upward adjustment of the lodestar.

26 4. *The Results Obtained*

27 The results or “degree of success” obtained is the most important consideration
 28 when the court determines what is a reasonable fee award *and whether to adjust it*

1 *upward. Hensley, supra*, 461 U.S. at 436; *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th
 2 Cir. 1995). “Success is not measured only by the amount of recovery but also in terms
 3 of the significance of the legal issue on which the plaintiff prevailed and the public
 4 purpose the litigation served.” *Morales v. City of San Rafael*, 96 F.3d 359, 365, as
 5 amended on denial of rehearing and rehearing en banc, 108 F.3d 981 (9th Cir. 1997)
 6 (Emphasis added). “Such a nonmonetary victory may constitute ‘excellent results’ for
 7 the purpose of calculating attorney’s fees”. *McCown v. City of Fontana*, 565 F.3d
 8 1097, 1105 (9th Cir. 2009).

9 Here, the results obtained were in no doubt significant and served a substantial
 10 public interest. Indeed, the public benefit in this case was expressly acknowledged by
 11 the Ninth Circuit, strongly justifying an increased award. Other appellate courts have
 12 endorsed the use of multipliers to increase the lodestar figure, observing that
 13 enhancement with a multiplier “can serve as a means to account for the risk an attorney
 14 assumes in undertaking a case, the quality of the attorney's work product, and the public
 15 benefit achieved.” *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th
 16 Cir. 1993) (Emphasis added). See also, *In re Sulzer Hip Prosthesis & Knee Prosthesis*
 17 *Liab. Litig.*, 268 F. Supp. 2d 907 (N.D. Ohio 2003)(multipliers ranged as high as 19.8,
 18 with “the effective overall lodestar multiplier [equaling] about 2.4.”) *Id.* at 939. While
 19 these cited cases are not Lanham Act cases, one of the main justifications for the
 20 enhancement is the benefit obtained for others, and thus these cases are analogous to
 21 this case. Without question, Plaintiffs’ efforts resulted in a substantial public benefit
 22 which ameliorated a serious public harm, and which culminated in a decision which
 23 affirmed the finding of *willful* false advertising and the imposition of a permanent
 24 injunction. Every step taken by Plaintiffs was a necessary step to their ultimate victory.

25 Accordingly, Plaintiffs respectfully submit that an enhancement of the fees
 26 incurred is appropriate in this case, and that a 2.0 multiplier is reasonable for this
 27 purpose given the factors discussed above.

1 **V. PLAINTIFFS ARE ALSO ENTITLED TO THEIR COSTS**

2 In addition to fees, Plaintiffs should also be awarded their costs. A district court
3 may award not only those costs that are automatically taxable under 28 U.S.C. § 1920,
4 but also otherwise non-taxable costs incurred by the prevailing party. *Twentieth*
5 *Century Fox Film Corp. v. Entertainment Dist.*, 429 F.3d 869, 885 (9th Cir. 2005)(“we
6 hold that district courts may award otherwise non-taxable costs, including those that lie
7 outside the scope of § 1920”); *see also Davis v. City and County of San Francisco*, 976
8 F.2d 1536, 1556 (9th Cir. 1992)(attorneys’ fee awards can include reimbursement for
9 out-of-pocket expenses such as travel, messenger, and copying costs), *vacated in part*
10 *on other grounds*, 984 F.2d 345 (9th Cir. 1993).

11 Costs not taxed by the Clerk initially are recoverable as non-taxable costs. *See*
12 *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1021-1022 (D. Ariz. 2007)(Plaintiffs
13 sought \$ 11,462.35 of Billed Costs not taxed by the Clerk of the Court; the district court
14 awarded these costs to Plaintiff); *See also Express LLC v. Forever 21*, Case 2:09-CV-
15 04514, Dkt. # 4783 (C.D. Cal., Nov. 15, 2010) (holding that “properly included in an
16 award of attorney’s fees are costs and fees for paralegals, out-of-pocket expenses,
17 including travel, telephone, mailing, copying and computerized legal research
18 expenses”); *Ambriz v. Arrow Fin. Serv., LLC*, 2008 WL 2095617 (C.D. Cal., May 15,
19 2008). *See also Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir.
20 1992) (“we have continued to hold that attorneys’ fees awards can include
21 reimbursement for out-of-pocket expenses [not taxed by the Clerk] including the travel,
22 courier and copying costs”).

23 Plaintiffs are also entitled to their expert fees. *See Kourtis v. Cameron*, 358 Fed.
24 Appx. 863, 885 (9th Cir. Cal. 2009)(The Ninth Circuit found it not to be an abuse of
25 discretion to include an additional \$37,850.00 to compensate plaintiff’s expert witness
26 because non-taxable costs may be included in the calculation of costs); *See also*
27 *ClearOne Communs., Inc. v. Chiang*, 2009 U.S. Dist. LEXIS 121061 (D. Utah Dec.
28 30, 2009)(“The court agrees that given the expense of expert witnesses, recovery of

1 their fees would be fair. And such a recovery would remove one more barrier from the
 2 path of aggrieved parties who have meritorious claims.”); See also *Harris v. Marhoefer*,
 3 24 F.3d 16, 20 (9th Cir. 1994)(expert witness fees “are recoverable expenses as part of
 4 the reasonable ‘attorney's fees’ award”).

5 Here, Plaintiffs have identified in the accompanying Joint Statement for Costs,
 6 costs that were necessarily incurred in this case which Plaintiffs are entitled to as a
 7 matter of law. As set forth therein, these include copying services, courier costs,
 8 transcript costs, expert fees and expenses, other expenses reasonably and necessarily
 9 incurred, as well as fees not taxed by the Clerk of Court, totaling to \$65,001.44.
 10 Hamilton Decl., ¶¶14-15, Exs. F and G. Accordingly, Plaintiffs seek, as they are
 11 entitled to, all of the costs as claimed.

12 **VI. CONCLUSION**

13 For all the foregoing reasons, Plaintiffs’ motion should be granted.

14
 15 Respectfully submitted,

16 DATED: November 3, 2011

LEWIS BRISBOIS BISGAARD & SMITH LLP

17
 18 Bv: /s/

19 David N. Makous
 20 Daniel C. DeCarlo
 21 Mina I. Hamilton
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Table 1: List of Issues that Plaintiffs have Prevailed On

	Issues on Appeal	In Favor of Plaintiffs?	In Favor of Defendants ?	Citation to Opinion
1.	Article III standing	✓		p. 9742
2.	Prudential standing under Section 43(a) of the Lanham Act	✓		p. 9747
3.	Materiality of the false statements	✓		p. 9748
4.	False advertising by Defendants	✓		p. 9748
5.	Willfulness of Defendants' deceptive actions	✓		p. 9755
6.	Imposition of a permanent injunction	✓		p. 9751
7.	Justifications for the splash page imposed by the district court as the permanent injunction	✓		p. 9749
8.	Potential modification of the permanent injunction ¹	✓	✓	p. 9751
9.	Finding that Defendants' conduct was not exceptional	✓		p. 9757
10.	Finding that Plaintiffs had unclean hands	✓		p. 9757
11.	Denial of attorney's fees	✓		p. 9757
12.	Denial of an award of profits to Plaintiffs		✓	p. 9753
13.	Defendants' liability as joint tortfeasors	✓		p. 9758
14.	Whether denial of motion for contempt and sanctions was an abuse of discretion		✓	p. 9758

¹ The modification issue goes both ways: As presented in the Joint Report filed by the parties before this Court on September 6, 2011, Plaintiffs seek a more stringent injunction, based on, *inter alia*, Defendants' continued deceptive marketing practices, deceptive implementation of the current injunction, and importantly, clear evidence of ongoing consumer confusion; on the other hand, Defendants seek the dissolution of the splash page based on its self-serving (and unsupported) claims regarding "changed" marketing practices and that there no longer is any consumer confusion.

Table 2**Actual Rates Compared to the “Prevailing Market Rate”**

Attorney	Title	Rates Charged	Prevailing Market Rate
David N. Makous	Partner	\$450	\$503
Daniel C. DeCarlo	Partner	\$260 - \$325	
Mina I. Hamilton	Partner	\$225 - \$260 ²	
Paula C. Greenspan	Partner	\$260	
Josephine A. Brosas	Associate	\$180 - \$235	\$349
Robert M. Collins	Associate	\$190	
Daniel R. Lewis	Associate	\$110 - \$180	

²Mina I. Hamilton became a partner during the course of this litigation and was a partner during the work performed on the appeal; however, as a courtesy to the client, her hourly rate previously applied as an associate was not adjusted. See, Hamilton Decl., ¶ [INSERT].

Table 3
Summary of Actual Fees Incurred

Description of Services Rendered	Billing Attorney	Time Spent	Rate	Total
Pleadings <i>(fact investigation; research; motion for leave; oppositions to defendants' motions to dismiss)</i>	David N. Makous	22.60	\$450	\$10,170
	Daniel C. DeCarlo	15.50	\$260	\$4,030
	Mina I. Hamilton	159.80	\$225	\$35,842.50
	Josephine A. Brosas	9.0	\$180	\$1,620
	Daniel R. Lewis	7.20	\$110	\$792
	Antonia Espinoza (Paralegal)	25.0	\$160	\$4,000
	Francine J. Biscardi (Paralegal/research librarian)	2.10	\$90-110	\$219
Total:	241.20			\$56,673.50
Discovery <i>(Written discovery and depositions; expert reports; surveys; motions)</i>	David N. Makous	182.00	\$450	\$ 81,900
	Thomas S. Kidde	1.4	\$450	\$630
	Daniel C. DeCarlo	149.40	\$260	38,844.00
	Mina I. Hamilton	385.10	\$225-260	\$ 86,772.5

Description of Services Rendered	Billing Attorney	Time Spent	Rate	Total
	Paula C. Greenspan	0.30	\$260	\$78.00
	Josephine A. Brosas	4.0	\$180	\$720
	Robert M. Collins	0.2	\$190	\$38
	Daniel R. Lewis	2.30	\$110	\$253
	Cynthia A. Dixon	0.50	\$170	\$85.00
	Antonia Espinoza (Paralegal)	37.20	\$160	\$5,952
	Bhawna Prabhawati (Paralegal)	6.50	\$110	\$715
	Francine J. Biscardi (Paralegal/research librarian)	4.60	\$110	\$506.00
Total:	773.30			\$216,455.50
Cross-Motions for Summary Judgment <i>(Research and preparation of moving and opposing papers)</i>	David N. Makous	51.90	\$450	\$ 23,354
	Daniel C. DeCarlo	92.10	\$260	\$ 23,946
	Mina I. Hamilton	226.40	\$225-260	\$ 51,087
	Paula C. Greenspan	20.70	\$260	\$5,382.00
	Isamu H. Lee	11.30	\$195	\$2,203.50

Description of Services Rendered	Billing Attorney	Time Spent	Rate	Total
	Josephine A. Brosas	20.20	\$180	\$ 3,636.00
	Cynthia A. Dixon	8.80	\$ 170	\$1,496
	Daniel R. Lewis	10.70	\$110	\$ 1,177
	Hilary Matthews (Paralegal)	5.20	\$110	\$572.00
	Bhawna Prabhawati (Paralegal)	15.40	\$110	\$ 1,694
	Francine J. Biscardi (Paralegal/research librarian)	0.40	\$110	\$44.00
Total:	463.10			\$ 114,592.5
Pre-Trial Submissions (Witness and exhibit lists, pre-trial conference order; stipulated facts; jury instructions; special verdict forms; deposition designations; findings of fact)	David N. Makous	43.60	\$450	\$ 19,620.00
	Daniel C. DeCarlo	147	\$260	\$ 38,220
	Mina I. Hamilton	349.60	\$260	\$ 90,896
	Paula C. Greenspan	19.20	\$260	\$ 4,992
	Antonia Espinoza (Paralegal)	3.90	\$160	\$ 624
	Loretta D'Errico (Paralegal)	23.90	\$110	\$ 2,629
	Francine J. Biscardi (Paralegal/research librarian)	3.70	\$110	\$407

Description of Services Rendered	Billing Attorney	Time Spent	Rate	Total
Total:	590.9			\$ 157,388
Trial and Post-Judgment <i>(Trial attendance; trial briefs to court; post-trial exhibit stipulations; findings of fact and conclusions of law; mandatory settlement conferences; cost bill)</i>	David N. Makous	38.4	\$450	\$ 17,280
	Daniel C. DeCarlo	153.9	\$260-325	\$ 42,906.50
	Mina I. Hamilton	230.9	\$260	\$ 60,034
	Paula C. Greenspan	44.30	\$260	\$ 11,518
Total:	467.50			\$ 131,738.5
Contempt <i>(Fact investigation; research; preparation of motion)</i>	David N. Makous	6.60	\$450	\$ 2,970
	Daniel C. DeCarlo	15.60	\$325	\$ 5,070
	Mina I. Hamilton	112.40	\$260	\$ 29,224
	Daniel R. Lewis	9.10	\$180	\$ 1,638
Total:		143.70		\$ 38,902
Motion for Attorney's Fees <i>(Preparation of motion papers and anticipated reply and hearing)</i>	David N. Makous	35.0	\$450	\$15,750
	Mina I. Hamilton	80.0	\$260	\$20,800
	Daniel C. DeCarlo	25.0	\$325	\$8,125
	Josephine A. Brosas	70.0	\$235	\$16,450
Total:		210		\$61,125

Description of Services Rendered	Billing Attorney	Time Spent	Rate	Total
Joint Status Report <i>(Preparation of 9/6/11 Joint Status Report pursuant to Court Order)</i>	David N. Makous	15.0	\$450	\$6,750
	Mina I. Hamilton	55.0	\$260	\$4,875
	Daniel C. DeCarlo	15.0	\$325	\$14,300
	Josephine A. Brosas	30.0	\$235	\$7,050
Total:		115		\$32,975
TOTAL ACTUAL FEES:		3,004.7 hours		\$809,850

Summary of Actual Costs and Expenses Incurred:

Date	Description	Amount
9/10/2008	DUPLICATION [Bill of Costs - Exhibits]	\$10.32
9/10/2008	DUPLICATION [Bill of Costs - Exhibits]	\$2.64
9/10/2008	DUPLICATION [Bill of Costs - Exhibits]	\$7.20
9/15/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 09/11/08 USDC-LOS ANGELES 4184279	\$33.55
9/24/2008	DUPLICATION	\$0.84
9/24/2008	DUPLICATION	\$14.64
9/24/2008	DUPLICATION	\$0.48
9/24/2008	LEXIS RESEARCH: DECARLO, DANIEL	\$27.89
9/29/2008	DUPLICATION [Opposition to Motion to Stay]	\$1.20
9/29/2008	DUPLICATION [Opposition to Motion to Stay]	\$1.20
9/29/2008	DUPLICATION [Opposition to Motion to Stay]	\$1.20
9/30/2008	DUPLICATION [Opposition to Motion to Stay]	\$0.24
9/30/2008	DUPLICATION [Opposition to Motion to Stay]	\$0.12
9/30/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 09/23/08 USDC-LOS ANGELES 4192765	\$22.55
9/30/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 09/24/08 USDC-LOS ANGELES 4194400	\$25.94
9/30/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 09/25/08 USDC-LOS ANGELES 4195346	\$25.94
9/30/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 09/26/08 USDC-LOS ANGELES 4196554	\$22.55
10/1/2008	LONG DISTANCE TELEPHONE	\$0.97
10/1/2008	DUPLICATION [Opposition to Motion to Stay]	\$0.72
10/2/2008	LONG DISTANCE TELEPHONE	\$1.30
10/6/2008	DUPLICATION [Opposition to Motion to Stay]	\$1.08
10/6/2008	DUPLICATION [Opposition to Motion to Stay]	\$0.24
10/15/2008	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 10/06/08 USDC-LOS ANGELES 4203041	\$33.55

1/5/2009	DUPLICATION [Motion for Contempt]	\$9.72
1/5/2009	DUPLICATION [Motion for Contempt]	\$0.12
1/5/2009	DUPLICATION [Motion for Contempt]	\$3.48
1/5/2009	DUPLICATION [Motion for Contempt]	\$0.12
1/7/2009	DUPLICATION [Opposition to Ex Parte re Hearing of Contempt]	\$0.12
1/15/2009	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 01/05/09 USDC-LOS ANGELES 4266469	\$47.00
1/15/2009	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 01/07/09 USDC-LOS ANGELES 4268175	\$31.72
1/15/2009	ATTORNEY SERVICE: OSCAR GARCIA MESSENGER #1 1/6/09 US DISTRICT COURT DELIVER DOCUMENT 135887	\$22.50
1/22/2009	LONG DISTANCE TELEPHONE	\$4.87
1/22/2009	DUPLICATION: VTOWLES [Opposition to Contempt Motion]	\$25.32
1/31/2009	FILING SERVICES: U.S. LEGAL MANAGEMENT SERVICES, INC. 01/27/09 USDC-LOS ANGELES 4283892	\$31.72
2/18/2009	LONG DISTANCE TELEPHONE	\$0.65
3/5/2009	LONG DISTANCE TELEPHONE	\$0.97
3/18/2009	LONG DISTANCE TELEPHONE	\$0.65
4/13/2009	DUPLICATION: SHARON HEFTE DPX	\$143.40
4/14/2009	DUPLICATION	\$4.20
4/17/2009	FEDERAL EXPRESS MAIL: FEDERAL EXPRESS CORPORATION 04/13/09 RECIPIENT: ERIC CREDITOR SENDER: MINA I. HAMILTON 796515046070	\$28.70
6/19/2009	LONG DISTANCE TELEPHONE	\$1.30
6/19/2009	DUPLICATION	\$2.40
6/19/2009	DUPLICATION	\$15.00
6/25/2009	DUPLICATION	\$3.60
6/25/2009	DUPLICATION	\$65.76
6/25/2009	DUPLICATION	\$2.40
6/26/2009	DUPLICATION	\$22.68
6/26/2009	DUPLICATION	\$0.48
6/26/2009	DUPLICATION	\$0.36
6/26/2009	DUPLICATION	\$0.36
6/26/2009	LEXIS RESEARCH	\$4.54

6/27/2009	LEXIS RESEARCH	\$4.67
6/28/2009	LEXIS RESEARCH	\$5.96
6/29/2009	DUPLICATION	\$0.36
6/29/2009	DUPLICATION	\$0.12
6/29/2009	DUPLICATION	\$1.92
6/29/2009	DUPLICATION	\$1.32
	SUB-TOTAL:	\$724.85
	Deposition Transcripts (less costs awarded on 9/25/08)	\$1,845.48
	Court Transcript Fee (Discovery Hearing Transcript - Required to Prepare Proposed Court Order)	\$443.00
	Court Transcript Fee (Pretrial Hearing Transcript - Required for Post-Trial Briefing)	\$114.08
	Trial Transcripts (Required by Court for Post-Trial Findings/Brifings-Bench Trial)	\$2,670.28
	Fees and Disbursements for Printing (less costs awarded on 9/25/08)	\$725.75
	<u>Surveys</u> (Local Rule 54-4.13)	
	Zoomerang.com (Survey Expenses)	\$5,900.00
	Professional Services (Dr. Maronick - Invoice 1)	\$18,025.00
	Professional Services (Dr. Maronick - Invoice 2)	\$34,553.00
	TOTAL:	\$65,001.44

Table 4**(Summary of Actual, Lodestar and Enhanced Fees)**

	Total Fees (Pre-trial to Post-trial, excluding Appeal)
Hours Billed	3004.7 hours
Actual Fees Charged (Applying Actual Rates)	\$ 809,850
Lodestar Figure (Applying Prevailing Market Rates)	\$ 1,433,808
Enhanced Figure (Applying 2.0 Multiplier Based on <i>Kerr</i> Factors)	\$ 2,867,616

Table 5

Step-by-Step Illustration of Defendants' Continued Deceptive Marketing Practices

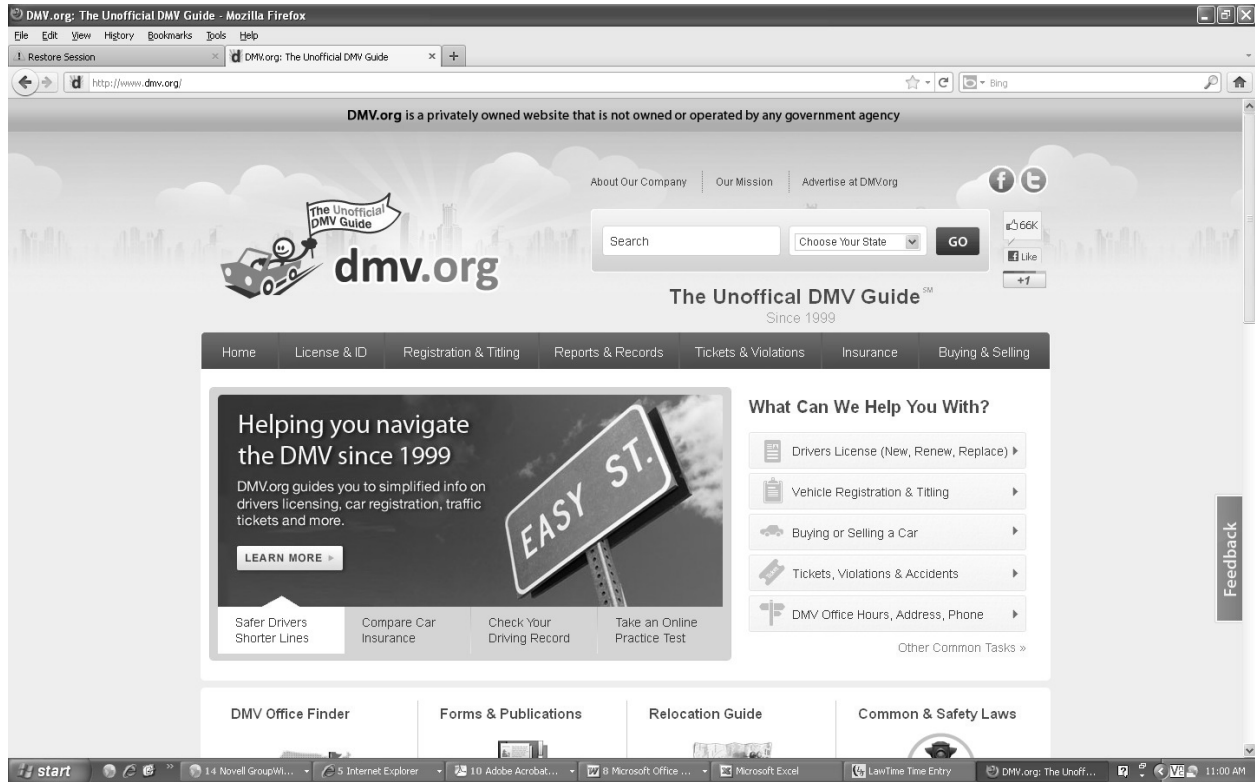
1. DMV.ORG's "Splash Page"



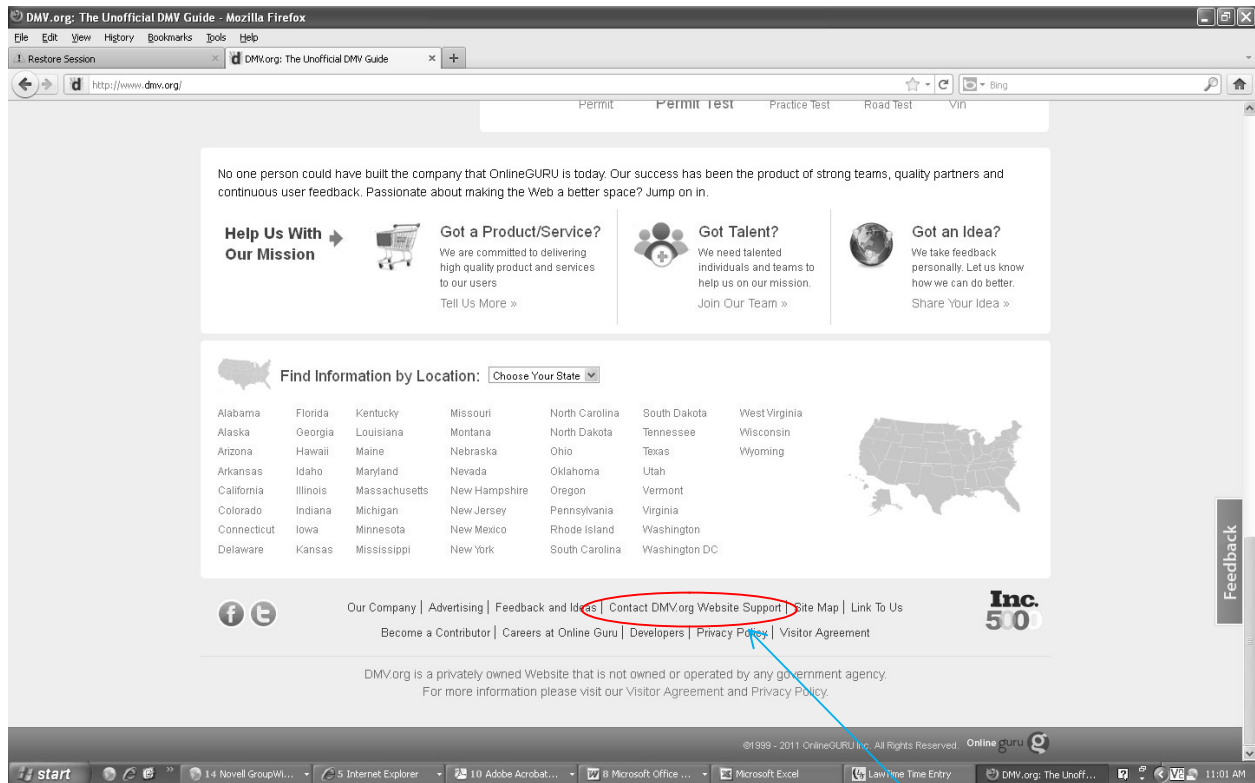
"Disclaimer" in very faint grey font which appears adjacent to the toolbar *after* a 2-3 second delay



2. DMV.ORG's "Landing Page" after the "Splash Page" "Continue" button is clicked (TOP-portion of Landing Page)

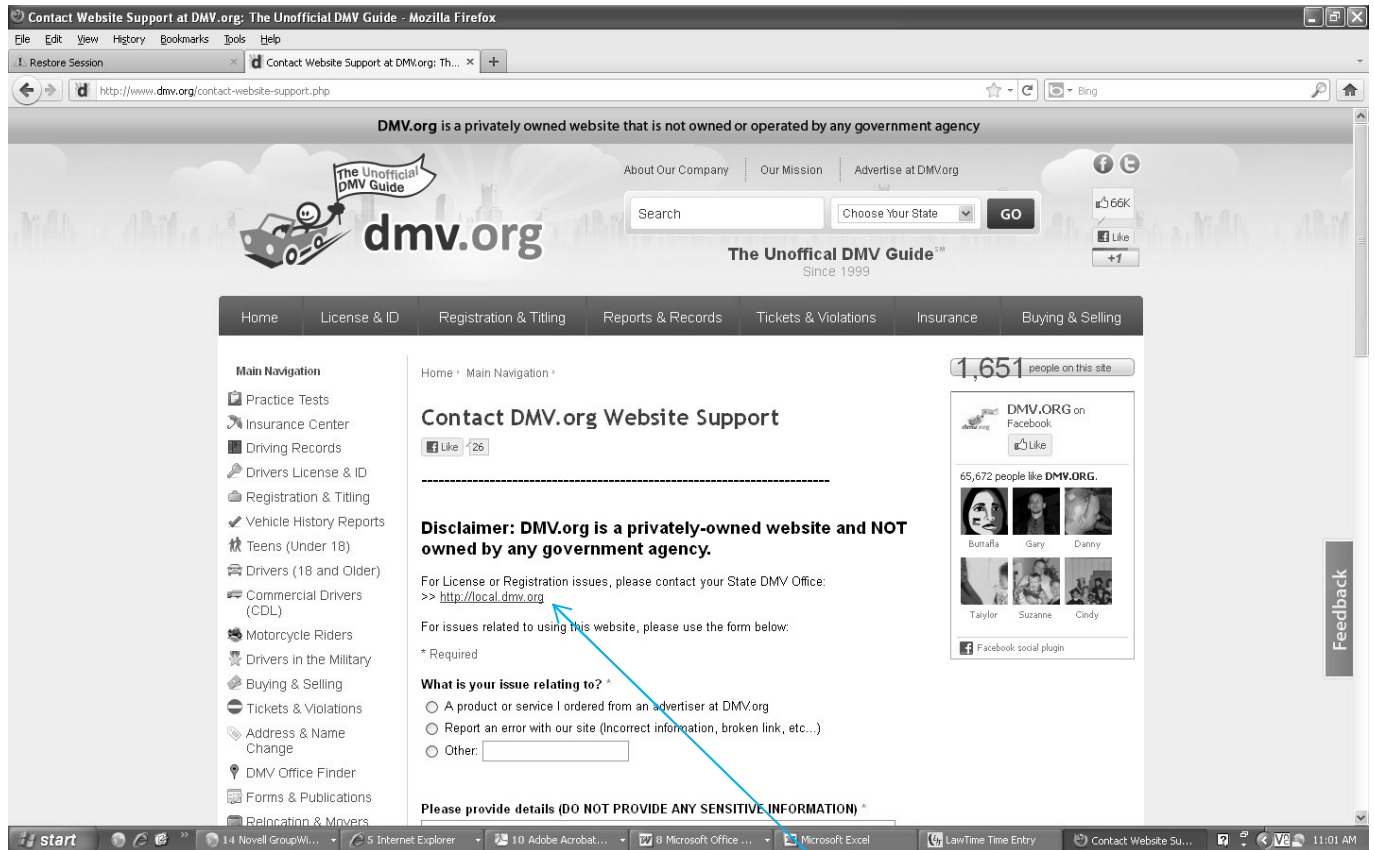


3. DMV.ORG's "Landing Page" after the "Splash Page" "Continue" button is clicked (BOTTOM-portion of Landing Page)

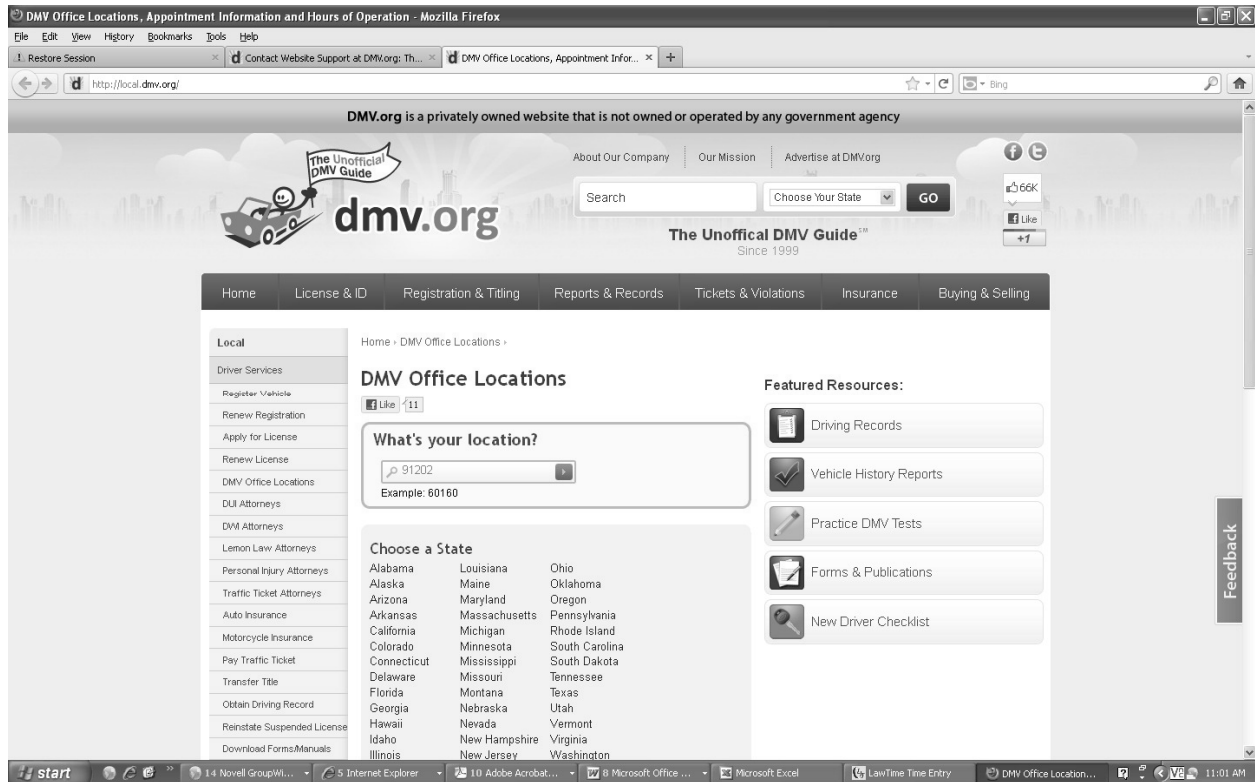


"Contact DMV
Website Support"
Button

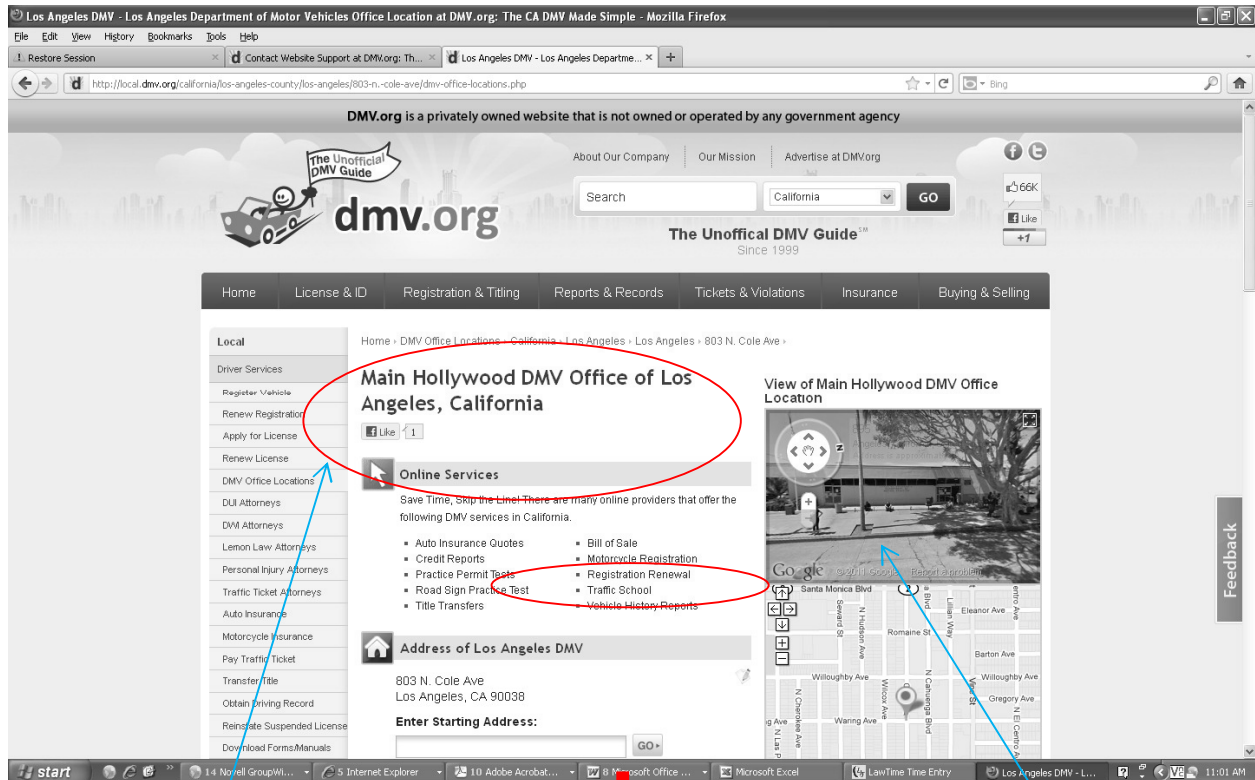
4. After the “Contact DMV Website Support” Button is Clicked:



5. After the “Link” to “Your State DMV Office” is Clicked, the website prompts the consumer to enter his/her DMV Office ZIP code:



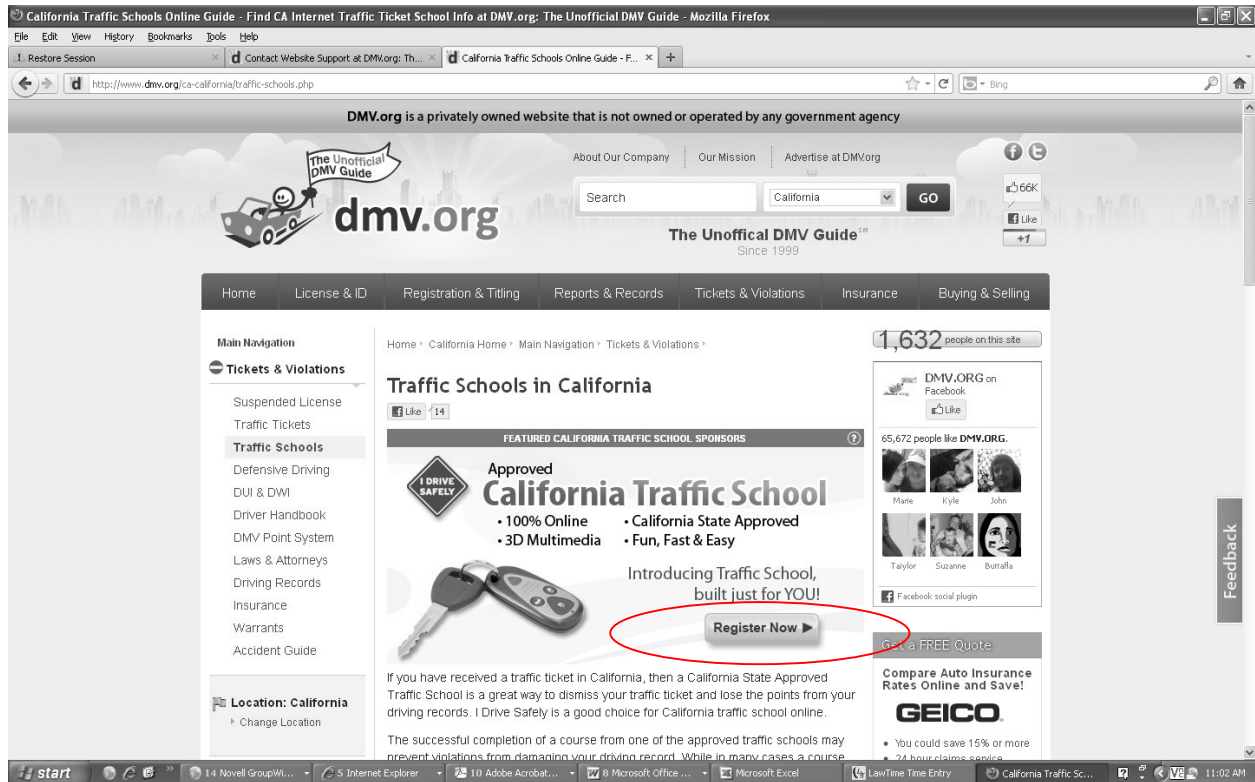
6. After ZIP code is entered, the website “links” to a purported local DMV’s “ONLINE SERVICES” with various links including to traffic schools and registration renewals.



“Main Hollywood DMV Office of Los Angeles, California” “Online Services”

Photograph of the local DMV office

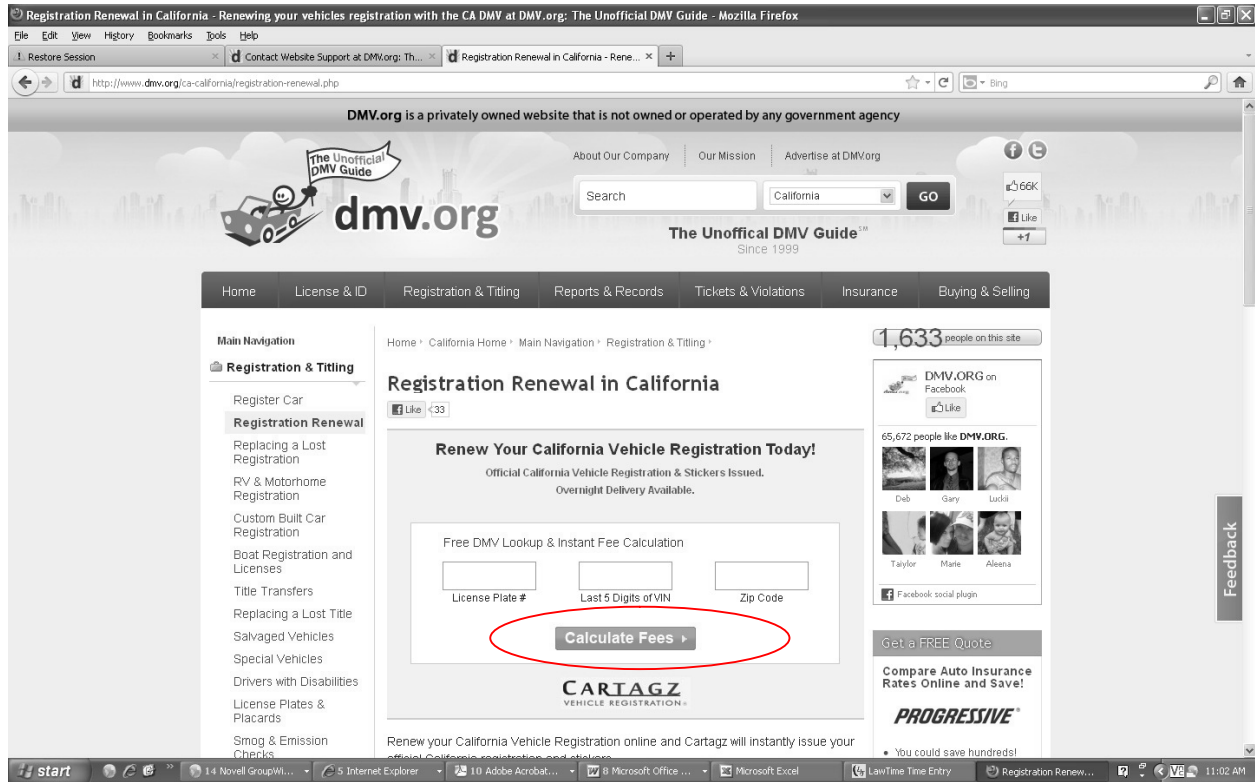
7. After “traffic school” is clicked, the website leads to a DMV.org affiliate traffic school, iDriveSafely.



8. After the “register now” button is clicked, DMV.org links to its affiliate’s website, www.idrivesafely.com:



8. Going back to #6 above, after the “registration renewal” button is clicked, DMV.org links to its affiliate CARTAGZ’s website.



9. After the “calculate fees” button is clicked, DMV.org links to its affiliate’s website, www.cartagz.com:

The screenshot shows the Cartagz website interface within a Mozilla Firefox browser window. The website is titled "CARTAGZ VEHICLE REGISTRATION" and is described as "California's Leading Online Vehicle Registration Service" and "LICENSED BY THE CALIFORNIA DMV". A navigation menu includes links for Home, About Us, View Our License, Contact, DMV Services, Forms, Instructions, Testimonials, Fees, Insurance Producers, Fleets, and Affiliates. A prominent banner reads "Instant Online CA DMV Registration - Next Business Day Delivery - Same Day E-Copy".

The main content area is titled "Complete Your CA DMV Registration in 3 Simple Steps" and is divided into three columns:

- 1 Your Information:** Includes a photo of a woman driving and the text "You're Always First In Line with Cartagz!". Below this is a "Client Testimonials" section with a quote from David in San Diego, CA. The primary instruction is "Enter your vehicle information for an instant DMV Registration fee lookup." Below this is a "Select Your Vehicle Type:" dropdown menu.
- 2 Payment Center:** The instruction is "Pay your DMV registration fees online & avoid future penalties." Below this is a "Choose a Service:" section with radio button options: "Annual Vehicle Registration Renewal" (selected), "Replace Lost Registration Card and/or Sticker" (with a sub-note "Also choose this option to clear parking/toll violations"), "Transfer a CA Vehicle Title", and "Replace Lost CA Vehicle Title".
- 3 Complete:** The instruction is "Your official DMV registration card & sticker are shipped immediately."

Below the "Choose a Service:" section, a "Please Enter the Following:" form contains input fields for License Plate # (4YLVW624), Last 5 of VIN (23256), Zip Code (91202), E-Mail Address, and Please Confirm E-Mail Address. A "What's this?" link is next to the VIN field. A note states "E-mail addresses are not shared with third parties". A "Next" button is at the bottom of the form.

A large red arrow points downwards from the "Next" button area towards the bottom of the page.

9. Consumers, such as Mr. Tom Pniewski, gets confused and thinks that his DMV has now charged him additional fees (but actually, he was paying additional fees to Cartagz, not the DMV). Mr. Pniewski's comments complaining to DMV.org's Facebook page, copied below:

